2006

State of Utah v. Randy Shea Gardner : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	Case No. 20060281-SC
RANDY SHEA GARDNER,	:	
Defendant-Petitioner.	:	

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether due process necessitated review of the cross-examination testimony of one of the State's witnesses, where Petitioner claimed entrapment, the recorded transcript does not include the cross-examination testimony, and the court of appeals did not address the district court's proposed reconstruction of that testimony?

"On certiorari, we review the decision of the court of appeals for correctness." *State v. Cram*, 2002 UT 37, ¶ 6, 46 P.3d 230.

OPINION OF THE COURT OF APPEALS

The opinion of the court of appeals in *State v. Gardner*, 2005 UT App 21 (January 26, 2006) (per curiam) (unpublished memorandum decision) ("*Gardner*"), is attached at Addendum A.

CONSTITUTIONAL PROVISIONS

Amendment XIV, United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Pretrial proceedings

Petitioner was charged by information with two counts of distributing, or offering, agreeing, consenting, or arranging to distribute a controlled or counterfeit substance (count 1—methamphetamine; count 2—heroin). R1-3. The magistrate bound petitioner over for trial. R294:24-26.

Petitioner filed a motion to dismiss on grounds of entrapment. R59-68. After an evidentiary hearing, the court denied the motion. R119-22; 288:107-10.

Petitioner's case was tried to a jury. At the end of the State's case, petitioner moved for a directed verdict based on the prosecution's failure to show an offer, agreement, consent, or arrangement to distribute drugs. R290:277-78. He also renewed his motion to dismiss based on entrapment because, without specification, he had elicited more evidence at trial that he was entrapped than he had at the entrapment hearing. R290:280. The trial court denied both motions. *Id.* After a three-day trial, the jury found petitioner guilty as to count 1, but not guilty as to count 2. R 279. Petitioner was sentenced to a statutory one-to-fifteen-

year prison term, to be served consecutively to another term he was then serving. R. 280; 292:5. Petitioner timely appealed. R281.

Trial - The prosecution

Leland Clark first became friendly with petitioner in 1999 or 2000, when they occupied adjoining cells in the Uintah maximum-security facility at the Utah State Prison—they "talk[ed] about everything." R289:108-11. That relationship still existed at the beginning of 2001, when they tattooed each other. R289:112.

December 2000 - Petitioner talked to Clark about bringing drugs into the prison through "Don," a medical technician, who was his friend and who delivered prescriptions to the inmates. R289:115-17. The pills were distributed to each inmate in a blister-pack or in a "little brown envelope." R289:117. Petitioner said that Don had delivered unprescribed pain medications to him a couple of times, and that the arrangement presented "a good opportunity to make some money." R289:115, 118; 290:171. Petitioner said, however, that he did not have a connection to supply drugs and that "he couldn't talk the [med tech] into doing it." R289:115.

January 10, 2001 - Clark passed this information to Kevin Pepper, an investigator for the Department of Corrections, who had transported him back to Utah from California in August 2000, and who had an office at the prison. R289:113-14, 118; 290:167-172. Pepper told Clark to "keep his eyes and ears open" and to try to learn more about the situation. R. 290:172. In exchange, Clark, who wanted to "compact"—be transferred—out of state, asked Pepper to write a letter to the Board of Pardons informing it of his

cooperation, if the investigation were completed. R290:173, 224-25. Pepper did not immediately agree, but did tell Clark that he would "take it up [his] chain of command." *Id.*[1] Meanwhile, Pepper verified that the med tech, Don Buckley, was on petitioner's visiting and telephone lists and that petitioner had called Buckley several times in the preceding months. R.290:175-78.

January 18 - Clark met with Pepper again. R290:181. Clark told Pepper that "he had discussed it with [petitioner], and [petitioner] wanted to hook up and get a deal going." R290:184. Pepper told Clark to tell petitioner that he had a source, and to give petitioner Pepper's undercover name, "Kevin Gilmore." Pepper also told Clark to have petitioner call him using Clark's PIN number. R289:118-120; 290:182-183. At that meeting, Pepper signed Clark up as a confidential informant. R 290:181.

January 29 - Pepper had a brief telephone conversation with Clark. R290:185-86. He reminded Clark to have petitioner contact him. R290:186. Clark told him that he had also given the name "Jackie" to petitioner as a contact, which Pepper never authorized. At about this time, Pepper requested a "mail cover"on petitioner—a prison examination of an inmate's mail with a copy of the letter and the envelope sent to the investigator. R290:187.

February 6 - Pepper intercepted a letter petitioner sent to Buckley. R290:188; State's Ex. 1.[2] In that letter, petitioner wrote that he knew Buckley had "a little $ problem,"

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[1] Following the investigation, Pepper agreed to write a favorable letter for Clark. R290:219.

[2] The envelope was stamped, "February 6, 2000." State's Ex. 1. The parties plainly agreed, however, that the correct date of the letter was February 6, 2001.

and that he "knew a way to help solve that," which was "fairly safe." State's Ex. 1.

February 12 - Pepper received a telephone call from petitioner, who referred to himself as "Shea." R290:190-91; R295:3. The conversation lasted about ten minutes and was recorded, a circumstance automatically announced at the beginning of collect prison calls. R290:192-94; State's Ex. 1, tape recording, transcribed at R127-44 (Addendum D).[3] Petitioner directed Pepper to call "Don" (Buckley), gave him Buckley's telephone number, and directed Pepper to say that "Shea said to call." R290:258; 295:2-5. Pepper acknowledged that he was the first one to bring up drugs. R290:194. Pepper asked: "Well . . . what are we looking at? A whole 'Z,' half 'Z'?" R133; 291:329. Petitioner responded, "He was saying something about a whole one and I think he'll probably go with that . . . if it can be worked out the right way." *Id.* When Pepper expressed surprise about bringing in such a large quantity at once, petitioner said it would be done with "little manila envelope[s]." R133. When Pepper asked if there was any market for some "black" (heroin) in the prison, petitioner immediately responded that he could "probably check around." R134. When Pepper asked if Buckley would be paid "five-one" for "one black," or "one 'Z' of white" (cocaine) petitioner said, "Right." R135; 289:123; 290:248; 295:8-9. When Pepper said that he did not want to call Buckley unless Buckley knew what was going on, petitioner responded as follows:

R290:220

[3] The transcripts of petitioner's three recorded telephone calls to Pepper are contained in the exhibit envelope.

> Well, he knows—he knows that I—basically what I told him, I said, I've got a way for you to make some extra cash, bro, I know you're hurting. And I told him it's relatively safe, you're dealing directly with me, I said, so you don't have to worry about anybody else, and headaches or hassles, you just get what you get, you bring it to me and you know how that goes. He said, okay, no problem.

R136. Petitioner also told Buckley, "You won't have to wait forever. You'll be taken care of." *Id.* Petitioner and Pepper made plans to talk again. R143-44. Petitioner never sounded reluctant to bring drugs into the prison. R290:259.

According to Clark, the first time petitioner used the number, he reported to Clark that he and the "supplier" had talked about getting "cocaine and heroin lined up." R289:120. Clark reported that "[petitioner] was pretty excited about it." *Id.* "It sounded," petitioner said, like it was going to be a good deal." *Id.* Petitioner also told Clark that he would try to enroll the med tech, "Don," to call Pepper about acting as the connection into the prison. R289:121. Clark told petitioner that he would help sell the drugs within the prison. R289:120.

Clark acknowledged that he indicated to petitioner that it was important to him that petitioner get Buckley enrolled in their plan because it would make them some money for their "compacts" and out-of-state transportation costs. R289:121-22. Petitioner and Clark also discussed how much Buckley would make—about half of all the proceeds, because he was taking the biggest risk. R289:123-24. According to Clark, petitioner said he had had a couple of conversations with Buckley before he could "get things lined up," and that although Buckley had financial problems, he would probably participate only one time

because he was "scared." R289:121, 124.

February 13 - Pepper intercepted a second letter petitioner sent to Buckley. R290:189. In that letter, petitioner gave Buckley the name and telephone number "for that guy I was talking to you about—"Kevin or Jackie Gillmer." State's Ex. 3.

February 14 - Buckley called Pepper, without success. R289:142; 290:201-02.

February 16 - Petitioner called Pepper. R290:196; State's Ex. 4, tape recording, transcribed at R146-56. They talked about whether Buckley had yet called Pepper. R147-48. When Pepper said that he did not want to propose their plan to Buckley without his already knowing about it, petitioner agreed and said that Buckley should have received the letter he had sent a few days earlier. R148-49. Petitioner also agreed that Pepper could send some "black" into the prison, suggesting that a "quarter or a half would probably go." R149, 155.

February 18 - 10:21 a.m. - Petitioner called Buckley. R290:200-01, 249; State's Ex. 5. Buckley testified that he was employed as a medic at the prison beginning in October 2000, and that his job was to distribute medications, when prescribed, to the inmates. R289:130-31. Within a couple of months of starting his job, he came across petitioner, whom he knew. *Id.* As to the February 18 telephone call, he reported that petitioner told him that "[petitioner] wanted [him] to bring a manila envelope into the prison after contacting this person in the letter." R289:141-43.

February 18 - 1:22 p.m. - Petitioner called Pepper. R290:197; State's Ex. 4, tape recording transcribed at R172-78. Petitioner said, "I called to let you know that I just talked to [Buckley]," and that Buckley was then at home. R.173-74; 290:249-50. Pepper, acting

under the belief that petitioner had told Buckley what their plan involved, said that he would try to call him. R173; 290:236, 250. In response to Pepper's inquiry, petitioner also indicated that he could "move" either "black" or "brown," which Pepper testified referred to types of heroin. R174-75; 290:248.

February 18 - 9:35 p.m. - Buckley called Pepper. R289:; 290:198-99, 204, 206. When Pepper told him that the had "meth" and "heroin" for him to take into the prison, he immediately refused. R290:206. As Buckley put it, he was "not willing to risk his EMT certification, his house, his wife, his family, to do that." R289:143. Buckley testified that from speaking with petitioner, he did not know that the job involved bringing drugs into the prison, but rather involved "delivering plumbing supplies or stuff like that" for which he would be paid $500. R289:143-44. When Buckley later told petitioner that he refused to accept the risk of bringing drugs into the prison, petitioner said "he understood and he'd take care of it." R289:144-45.

Buckley was later fired from the prison, though he later heard from Pepper that he had been cleared concerning his involvement in petitioner's activities. R289:145-46. He testified that he never gave any inmate prescription drugs that were not prescribed, nor any drugs. R289:156-57. He also said that he never talked with petitioner about trafficking drugs in the prison. R289:157.

February 22 - Clark called Pepper and informed him that the investigation had been "burned"—foiled—because Pepper had been "made out to be a cop." R290:202-03.

Trial - The Defense

Petitioner testified that he never arranged or planned to bring controlled substances into the prison. R291:281. He had been living in the same section of the prison with Clark until January 2, 2001, at which time he was moved to Uinta 4, section 6. R291:282. Sometime around January 25, he was moved back around Clark. *Id.* A few days later, after hearing petitioner talk about Buckley's financial difficulties, Clark said he had a financially stable friend who might assist with a loan or a job. R291:282-83. Petitioner asked for the contact information—"Kevin Gilmore and a Jackie Gilmore"—with the understanding that he would talk to Kevin and find out about the job. R291:282-84. Petitioner also wrote a letter to Buckley about February 4 or 5. R291:284, 300; State's Ex. 1. At the time he wrote the letter, he thought the opportunity he was offering Buckley involved a loan or a possible job, repossessing cars or making business deliveries. R291:299. According to petitioner, Clark asked petitioner almost daily if he had received a response from Buckley, and he became irritable when he heard from petitioner that Buckley had not responded. R291:303.

During his February 12 telephone conversation with Pepper, petitioner described, "things went a little—a little out of the way I thought they were going to go. He—he started talking about other stuff, other than the job, it appeared like." R291:285. When petitioner asked Clark what Pepper was referring to, Clark said, "This is something that me and [Pepper] are doing on the side. It has nothing to do with you." *Id.* Petitioner "[went] along" with Pepper's comments because Clark had told him that "his friend was the type of person that we really wanted to keep happy, whatever." R291:286. When Pepper started using words like "white, black," during their February 16 conversation, petitioner said, "[he]

wasn't really sure what [Pepper] was talking about." *Id.* He again went along with Pepper's comments for the same reason he earlier stated. R291:286-87. As to his direction to Buckley during their February 18 conversation—that Buckley's job would involve bringing a manila envelope into the prison—petitioner, "wasn't sure" how the envelope was involved in the job. R291:288-89. Petitioner also said Pepper referred to keeping petitioner from getting petitioner's "ass in a jam" and Pepper was going to New York. Petitioner said this made him concerned for his safety if he did not placate Pepper. R291:290-93.

On cross-examination, the prosecutor elicited that petitioner later told investigators that after he spoke to Kevin he (petitioner) told Clark, "I don't know whether Don will do this or not." R291:306. He acknowledged, however, that during the February 12 telephone conversation, he told Pepper that he had Buckley, "under his thumb." R291:334; 295:7. Petitioner acknowledged that he agreed to "move some black," but he denied that he knew what "black" referred to or that he knew the job involved moving drugs. R291:336-37; 295:7-8. Assertedly still thinking that the job might yet involve delivering phone books, petitioner confirmed that Buckley was to be paid "five ones," a term he "assumed" meant $500. R291:337. Petitioner admitted that he, Pepper, and Clark had equal responsibility for the charges brought against him. R291:315-16.

Post-trial proceedings

After appealing, petitioner moved for summary reversal in the court of appeals. He claimed that he was deprived of his constitutional right to appeal because a significant part of his cross-examination of Leland Clark, a governmental agent whose testimony was central

to his claim of entrapment, was missing. The State responded with a motion to remand to reconstruct the record. The court of appeals denied petitioner's motion and granted the State's motion. *See* Order (Addendum B).

On remand, the parties reviewed the audiotapes of trial and confirmed that Clark's cross-examination and some portion of the prosecution's redirect examination were missing due to a recording malfunction. R296:3; 297:2-3, 7. Defense counsel was unable to specifically recall his cross-examination because he did not write down his questions or Clark's responses. R297:4. *See* Defense Counsel's Response to Request for Reconstruction of Record, "Petitioner's reconstruction," R304-05 (Addendum C). Instead, he had made an entrapment checklist and crossed off each entrapment element as he felt satisfied that it had been established. *Id.* He did, however, believe that his cross-examination at trial elicited more evidence of entrapment than at the entrapment hearing. R297:5. He recalled that at trial Clark urged petitioner to make telephone calls to move drugs into the prison and made statements to coerce petitioner to act, although counsel could not be specific as to what the coercive actions were. R297:5, 9-10; 305.

The prosecutor repeatedly asserted that based on his notes of defense counsel's questions and Clark's answers on cross-examination at trial and on his notes from the entrapment hearing, the record could be adequately reconstructed. R296:3; 297:3, 11-12; 298:2-3. In support of that effort, the prosecutor made a fairly detailed statement of Clark's cross-examination at trial. *See* First Response to Request for Reconstruction of Record, "Prosecution's reconstruction," R300-03 (Addendum D). The prosecutor's statement

acknowledged the following concerning defense counsel's cross-examination of Clark: (1) Clark was aware of Buckley's financial distress; (2) Clark never saw Buckley bring any controlled substance into the prison; and (3) Clark "urged [petitioner] to make the arrangements with the phone call and everything, but [petitioner] was excited on his own about making some money." R301.

Following the court of appeals' order of remand, the trial court considered whether the record could be adequately reconstructed and, if not, whether petitioner was prejudiced. R296:4. The trial court found that although the audiotape of Clark's cross-examination was not part of the record, the prosecutor's proposed statement, along with Clark's testimonies on direct examination at trial and cross-examination at the entrapment hearing, constituted a satisfactory reconstruction of the record. R296:5. The court also concluded that defendant was not prejudiced. *Id.*

SUMMARY OF ARGUMENT

Due process does not require reversal of the court of appeals' conclusions that the record was sufficient to afford petitioner a meaningful appeal. The court of appeals ordered that the parties and the trial court try to reconstruct the missing record of the cross-examination of one of the State's principal witnesses. The trial court directed that effort and ruled that the reconstruction was satisfactory. While the court of appeals did not consider the efficacy of that reconstruction in its decision, it nonetheless concluded that the remaining record was sufficient in itself to show that petitioner was not entrapped. It reasoned that any contradictory evidence in the missing record was, at most, inconsistent testimony that the jury

chose not to believe. Thus, the court of appeals held that petitioner was not denied due process because "the absence or incompleteness of the record [did not] prejudice[] the appellant." *State v. Gardner*, 2005 UT App 21, at pp. 1-2.

The court of appeals' decision was ultimately correct. The reconstructed record was adequate and effective to provide petitioner with a meaningful appeal in compliance with due process. On certiorari review, petitioner repeatedly denies that conclusion, asserting that the missing cross-examination was central to his entrapment defense. However, he neglects to mention that the reconstructed record consisted, in part, of a complete transcript of *all* the witnesses' testimony at a pretrial entrapment hearing. And while petitioner argues that he produced more evidence of entrapment at trial than he did at the entrapment hearing, he has wholly failed to identify a single additional fact, either in closing argument or at the reconstruction hearings. Finally, additional evidence shows beyond a reasonable doubt that defendant was not entrapped: Tape recordings of petitioner's conversations with the undercover officer reveal that petitioner was merely given an opportunity to commit and offense that he was independently planning.

ARGUMENT

PETITIONER WAS NOT DENIED DUE PROCESS—RIGHT TO A MEANINGFUL APPEAL—WHERE THE RECONSTRUCTED RECORD ADEQUATELY RECREATED MISSING TRIAL TESTIMONY AND DID NOT PREJUDICE PETITIONER

Petitioner claims that the reconstructed record of Leland Clark's missing cross-examination, lacks sufficient detail. As a result, petitioner asserts that he cannot meaningfully argue on appeal that he was entrapped and that the evidence was insufficient to convict him. Pet. Br. at 20-28. Consequently, he claims, he was denied due process, requiring that his conviction be reversed and that his case be remanded for a new trial. Pet. Br. at 28. Petitioner is mistaken. Although the court of appeals did not consider the reconstructed record, the trial court did. It correctly found that the missing record could be adequately reconstructed from the prosecutor's notes, Clark's direct examination at trial, and his cross-examination at the entrapment hearing. Consequently petitioner had the necessary record to pursue a meaningful appeal, consistent with due process. Additionally, the reconstructed record and the trial proceedings as a whole are sufficient to show that petitioner was not entrapped.

A. Petitioner is not entitled to a new trial unless he can show that a missing portion of the trial record cannot be adequately reconstructed and that he would be prejudiced by having to rely on a reconstructed record.

"The right of appeal is a fundamental right." *State v. Menzies*, 845 P.2d 220, 241 (Utah 1992). "Due process 'requires that there be a record adequate to review specific claims of error already raised.'" *West Valley City v. Roberts*, 1999 UT App 358, ¶ 11, 993 P.2d 252

(quoting *State v. Russell*, 917 P.2d 557, 559 (Utah Ct. App. 1996).

"However, there is no constitutional right to a perfect transcript. Rather, criminal defendants have the right to a 'record of sufficient completeness to permit proper consideration of [their] claims.'" *Menzies*, 845 P.2d at 241 (quoting *Draper v. Washington*, 372 U.S. 487, 499 (1963)). However, a "record of sufficient completeness" does not translate automatically into a complete verbatim transcript; the state may find other means of affording adequate and effective appellate review. *Mayer v. City of Chicago*, 404 U.S. 189, 194 (1971) (citing *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)). "A reconstructed record, as opposed to a verbatim transcript, can afford effective appellate review, particularly where appellate rules have established a procedure for reconstruction of the trial record." *United States v. Cashwell*, 950 F.2d 699, 703 (11th Cir. 1992). *See State v. Verikokides*, 925 P.2d 1255, 1257 (Utah 1996) ("In most circumstances, where the reporter's notes are lost or a transcript is incomplete or missing, the prosecution and defense counsel are required, pursuant to Utah Rule of Appellate Procedure 11(g), to hold a reconstruction hearing and attempt to produce a settled statement to stand in place of the incomplete or missing transcript for appeal purposes.")[4]

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[4] *See* Utah R. App. P. 11(g) provides:

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious and unable to afford a transcript, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to

In any case, "we do not presume error simply because a record is incomplete or unavailable." *Roberts*, 1999 UT App 358, ¶ 11 (quoting *Russell*, 917 P.2d at 560) (holding the defendant was not "unqualifiedly entitled to a complete record")). *See also State v. Morello*, 927 P.2d 646, 649 (Utah Ct. App. 1996) (holding no presumption of "error simply because record is unavailable"). "Rather, lack of an adequate record constitutes a basis for remand and a new hearing only where: (1) the absence or incompleteness of the record prejudices the appellant; (2) the record cannot be satisfactorily reconstructed (i.e., by affidavits or other documentary evidence); and, (3) the appellant timely requests the relevant portion of the record." *Roberts*, 1999 UT App 358, ¶ 11 (citing *Russell*, 917 P.2d at 558-59 & n.1).

The burden is on the moving party to show that the record is inadequate to permit meaningful appellate review. *See People v. Wilson*, 114 P.3d 758, 770 (Cal. 2005); *People v. Yavru-Sakuk*, 772 N.E.2d 1145, 1148 (N.Y. 2002) (defendant has the burden to make an "appropriate showing" that "alternative methods to provide an adequate record are not available") (citation omitted), *aff'd as modif'd on other grounds by* 829 N.E.2d 1187 (N.Y. 2005). *Cf. Womack v. State*, 476 S.E.2d 767, 769 (Ga. Ct. App. 1996) (where transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court).

Cases illustrate the principle that an adequate record on appeal may be reconstructed

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the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

in a way similar to that in this case, namely, through trial participant's notes and recorded portions of testimony that give context and content to the missing record.

In *Commonwealth v. Chatman*, 406 N.E.2d 1037 (Mass. Ct. App. 1980), one of the stenographer's tapes from which the transcription was to be made was missing. *Id.* at 1038. Consequently, substantial portions of the record were missing, including the testimony and argument on a pretrial motion to suppress identifications, the testimony of one witness and final argument on a pretrial motion to dismiss for lack of a speedy trial, the empaneling of the jury, the prosecutor's opening statement, and the testimony of the first witness at trial. *Id.* At least one of the missing portions was relevant to claims Chatman intended to raise on appeal, namely the denial of the pretrial motion to suppress his identification. *Id.* at 1038-39. On remand from the appellate court, the trial judge reconstructed the record by relying substantially on his detailed notes of the pretrial and trial proceedings. *Id.* Chatman thereupon filed a motion for a new trial, alleging that the original trial proceedings were necessary to his appeal, could not be reconstructed, and that his appeal required "a complete new transcript." *Id.*

To determine the adequacy of the trial court's reconstruction of the record, the Massachusetts Court of Appeals examined the transcript of the reconstruction hearing, the trial judge's "copious notes," the remainder of the trial transcript, which included the testimony of the two officers involved in Chatman's identification, and the array of photographs introduced at trial. *Id.* at 1038-39. The *Chatman* court particularly, the court noted that the judge's notes detailed the testimony of three witnesses at the suppression

hearing describing the officers' participation in the identification. *Id.* at 1039. The court also noted that the officers' testimony, which was fully transcribed, was fully consistent with the judge's notes. *Id.* Thus, by obtaining sufficient, mutually corroborating, accounts of the original proceeding, the *Chatman* court held that the trial proceedings were sufficiently reconstructed to present the defendant's challenge to the denial of his motion to suppress. *Id. See also Department of Community Affairs v. Utah Merit Sys. Council*, 614 P.2d 1259, 1261 (Utah 1980) (although record was deficient due to loss of witness's testimony resulting from tape recorder malfunction, affidavits of State's counsel and witness cured defect); *People v. Fuentes*, 282 P.2d 524, 526-27 (Cal. Ct. App. 1995) (judge's notes in narrative form sufficient where reporter's notes of part of trial lost); *People v. Malabag*, 59 Cal. Rptr. 847, 848-51 (Cal. Ct. App. 1997) (clerk's notes satisfactory substitute for conflicting reporter's notes).

B. The trial court correctly found that the record could be adequately reconstructed.

The court of appeals did not address whether the reconstructed record was adequate to provide petitioner with a meaningful appeal. *Gardner*, 2006 UT App 21. However, this Court is in as good a position to perform that task as the court of appeals. *See State v. Mirquet*, 914 P.2d 1144, 1149 (Utah 1996) ("[A]n appellate court is in as good a position as the trial court to apply the governing rules of law to the facts.")

Utah has never identified a standard for reviewing the adequacy of a reconstructed record. Other jurisdictions, however, have. "The determination that the record had been

adequately reconstructed is a finding of fact, reviewed for clear error." *State v. Williams*, 629 A.2d 402, 405 (Conn. 1993). *See also Jordan v. Lefevre*, 293 F.3d 587, 594 (2nd Cir. 2002) ("A trial court's factual findings will not be reversed absent clear error."); *People v. Osband*, 919 P.2d 640, 666 (Cal. 1996) ("We review the court's findings regarding the reconstruction of the missing exhibits, which are essentially factual, on a deferential substantial evidence standard."), *cert. denied by Osband v. California*, 519 U.S. 1061 (1997). "We then independently determine whether the record, as reconstructed and settled by the trial court, is adequate to allow the appeal to proceed meaningfully." *Id.*

Here, the trial court correctly determined that the record of Clark's missing cross-examination could be adequately reconstructed. At the final hearing, both defense counsel and the prosecutor tendered their reconstruction statements to the court. R296:2. Defense counsel's statement generally asserted that he believed that Clark's trial testimony—that he "urged" petitioner to make phone calls to Pepper and Buckley—was more extensive and more "coercive" than at the entrapment hearing. *See* Petitioner's Reconstruction, R304-05. The prosecutor's statement—based on his memory and notes from the trial and the transcript of defense counsel's cross-examination at the entrapment hearing—was substantially more detailed. *See* Prosecutor's Reconstruction, R300-302 (Addendum D). That statement summarized Clark's cross-examination testimony at trial as follows:

- Clark was sentenced to prison in 1989 for bad checks and fraud and had spent eight years in prison since then (R300);

- Clark was in prison for attempted securities fraud at the time of the instant events (R300);

• Clark met and began talking with petitioner in prison in August 2000 (R300);

• Clark saw Buckley talking to petitioner during the pill line toward the end of January 2001 (R300);

• Clark reported to Pepper on January 10 what petitioner had reported to him about Buckley, without exaggeration (R300);

• Clark asked Pepper for special considerations from prison officials, namely, a letter to the Board of Pardons recommending an early release and transfer to an out-of-state prison because of the risk of remaining in the Utah State Prison after being a snitch (R301);

• Clark learned from petitioner that Buckley was having some financial difficulties—inability to meet his monthly bills and facing possible bankruptcy (R301);

• Clark heard from petitioner that Buckley hoped to pay off some of his bills from his drug transactions with petitioner and Clark (R301);

• Clark knew that petitioner had known Buckley for many years before 2001, that petitioner and Buckley's wife were close personal friends, and that petitioner seemed concerned about Buckley's circumstances (R301);

• Clark was unaware that any heroin or cocaine had ever been brought into the prison (R301);

• Clark never saw Buckley bring any controlled substances into the prison (R301);

• Clark just told Pepper what he had heard petitioner say; "[petitioner] never said that Buckley brought in any heroin or cocaine; it was prescription pills that he was talking about" (R301);

• Pepper told him that he would have to provide more information to receive a letter to the Board of Pardons and a change in housing (R301);

• petitioner told Clark after January 10, 2001, when he returned to Unit 4, that they would get cocaine and heroin in the same way they got prescription pills—with the pill cart (R301);

• Clark "urged [petitioner] to make the arrangements with the phone call and everything, but [petitioner] was excited on his own about making some money. We talked about it almost every day, especially after we had someone to be the connection" (R301);

• Clark told petitioner that the connection was "a moneybags," "wealthy," and "well-off," and that he could give Buckley a job that would earn him money to deal with his bankruptcy problem (R302);

• Clark did receive a transfer out of state after March 2001; Clark hoped for a two-year cut in his time for testifying, but he had not yet received it (R302).

Reciting from the court of appeals' order of remand, the trial court noted that "[c]riminal defendants have a right to a record of sufficient completeness to permit proper consideration of their claims; they do not, however, have a right to a perfect transcript." R296:4. The trial court then found "that with the direct testimony of Mr. Clark from the trial that's on the tape and with the cross-examination on the tape from the entrapment hearing, and with [the prosecutor's] reconstruction of the record, the record can be satisfactorily reconstructed." R296:5.[5]

Nothing in the record suggests that the court's finding that the record was

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[5] Although the trial court labeled its finding a "conclusion" (R296:5), this Court is not bound by the trial court's classification. *See 50 West Broadway Assoc. v. Redevelopment Agency of Salt Lake City*, 784 P.2d 1162, 1171 (Utah 1989) ("[W]e are not bound by the trial court's classification of a finding of fact or a conclusion of law; we will make that classification ourselves.) "If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact. . . . However, 'if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.'" *Inland Foundry Co., Inc. v. Dep't of Labor and Indus.*, 24 P.3d 424, 429 (Wash. Ct. App. 2001) (noting that the challenged findings tracked the testimony presented and were properly labeled findings of fact) (citations omitted).

satisfactorily reconstructed is clearly erroneous. Petitioner has never challenged any specific item of the trial court's findings. Rather, he generally argues that at trial he established all the elements of entrapment and that he recalls that his cross-examination at trial went beyond that at the entrapment hearing. Pet. Br. at 25, 27. The record speaks otherwise.

The prosecutor's reconstruction of the content of Clark's cross-examination at trial tracks the testimony elicited from Clark on cross-examination at the entrapment hearing. R300-02. Any argument that the prosecutor's reconstructed record merely parrots the pretrial cross-examination is undercut by additional acknowledgments in the proposed reconstruction: that Clark was unaware that any heroin or cocaine had ever been brought into the prison; that he never saw Buckley bring any controlled substances, including heroin or cocaine, into the prison, but only prescription pills; and that petitioner told him they would get cocaine and heroin in the same way they got prescription pills—with the pill cart. R301.

Utah's appellate courts have found comparably reconstructed or incomplete records sufficient to afford the right to appeal and to due process. *See State v. Dunn*, 850 P.2d 1201, 1216 n.11 (Utah 1993) (holding reconstructed record adequate, in spite of absent motions and memoranda); *Whetton v. Turner*, 28 Utah 2d 47, 50, 497 P.2d 856, 858 (Utah 1972) (upholding denial of habeas petition notwithstanding complete absence of trial notes), *cert. denied*, 414 U.S. 862 (1973); *State v. Jonas,* 793 P.2d 902, 910 (Utah Ct. App.) (holding record adequate which lacked mistrial motion founded on juror-bailiff contact, where bailiff's testimony was recorded), *cert. denied*, 804 P.2d 1232 (Utah 1990). *Cf. State v. Taylor*, 664 P.2d 439, 445-47 (Utah 1983), (ordering a new trial where a juror's responses

to voir dire questions were absent from the record and could not be reconstructed). This Court should hold that the reconstructed record in this case similarly afforded defendant his right to appeal and to due process.

More importantly, petitioner's claim that the record could not be adequately reconstructed is rebutted by the absence of any evidence that defense counsel elicited anything more material information on cross-examination at trial than at the entrapment hearing. Petitioner claims, without specification or supporting notes, that he believes that at trial he established all the elements of entrapment and that his cross-examination at trial went beyond that at the entrapment hearing. Pet. Br. at 25, 27. Petitioner also recalls that Clark acknowledged that at trial that he "urged" petitioner to participate in the plan. Pet. Br. at 27. If petitioner had established a significantly more convincing case for entrapment, however, defense counsel would surely have argued those "missing" facts both when he renewed his entrapment motion at the close of evidence or in closing argument. R290:280. But he did not. As such, petitioner's insistence that he can prove, on appeal, that he was entrapped only if he has the original cross-examination asks that be allowed to "go fishing for error." *Russell*, 917 P.2d at 559 (rejecting need for a complete transcript where voir dire was missing); *Williams*, 629 A.2d at 406 (holding claim speculative where no specific error identified that would preclude appellate court review based on reconstructed record). *Cf. Chatman*, 406 N.E.2d at 1039 (rejecting claim that trial judge's reconstructed record was unsatisfactory where appellate counsel failed to produce trial counsel who might have been expected to give additional support to claim on appeal).

Here, when petitioner renewed his motion to dismiss based on entrapment, he said,

> [y]our Honor, I previously filed a motion for this before this Court with regard to entrapment and requested that this Court find as a matter of law that entrapment occurred. The entrapment occurred. Now that we have had this evidence, and in particular there's additional evidence that was not heard at the motion hearing, I would renew that motion.

R290:280. Counsel stated nothing more before the court denied the motion. If, in fact, petitioner truly believed he had established additional evidence, particularly when arguing to the same judge who had earlier denied the same motion, it appears obvious that he would have highlighted it. Since he did not, the reasonable conclusion is that no additional material evidence was produced at trial.

Similarly, defense counsel's closing argument is devoid of any facts that might have given additional support to the theory that petitioner was entrapped. The theory of the defense—put forth in counsel's closing argument—was that Clark, a con man and prison escapee with a long history of fraud convictions, falsely reported to Pepper that Buckley was bringing drugs into the prison. R291:377, 386, 392. In exchange for this information, Clark requested a deal for a transfer and a letter to the Board of Pardons for a time cut. R291:385. Clark and Pepper then devised a plan to entrap petitioner into arranging to distribute drugs by playing on petitioner's friendship with Buckley and his concern for Buckley's financial plight. R291:385-86. Clark urged petitioner to call Pepper. R291:387-89. When petitioner called Pepper, he learned to his surprise that Pepper was suggesting that petitioner bring drugs into the prison. R291:379-81. Clark and Pepper made sure that petitioner got the message that Pepper [was] "this big, powerful person with lots of money and connections to

New York." R291:380, 383-84, 390. This impliedly intimidating information was reinforced by Pepper's veiled threat to petitioner that Pepper would not want petitioner "to get his ass in a jam." R291:383. Consequently, petitioner was coerced into participating in the drug deal and merely played along to buy time until he could figure out how to extricate himself from this mess. R291:381-82.

The record demonstrates that defense counsel's closing argument did not materially expand on anything beyond the reconstructed record, which included the prosecutor's statement, the trial testimony, and Clark's entrapment hearing cross-examination. Stated differently, the reconstructed record discussed each of the foregoing components of petitioner's closing argument. In short, all of the allegedly added coercive testimony petitioner claims he elicited during Clark's missing cross-examination appears either in the reconstructed record or in the recorded trial proceedings.

Finally, any argument that petitioner was denied due process in pursuing a meaningful appeal due to defects in the trial court's reconstruction of the record should be rejected because he failed to timely discover the omission in the record, thereby compromising the parties' and the court's ability to further reconstruct the record.

In *Emig v. Hayward*, Emig claimed he was denied his constitutional right to appeal due to the loss of the court reporter's notes of his final habeas hearing. *Emig v. Hayward*, 703 P.2d 1043, 1048 (Utah 1985), *superceded by statute on unrelated point as stated in*, *Boudreaux v. State*, 989 P.2d 1103, 1108 (Utah Ct. App. 1999). This Court rejected the claim, concluding that because the nineteen-month delay from the habeas hearing to the

record reconstruction hearing was largely due to Emig's request for continuances, Emig and his counsel "must take responsibility for any difficulties arising from reconstruction of the record more than a year and a half after it was originally made." *Id.* at 1048-49. The Court noted that "[h]ad Emig or his counsel acted vigilantly, the loss could have been discovered earlier and the reconstruction hearing held much closer in time to the initial hearing, thus reducing the likelihood of memory loss." *Id.* at 1048. Similarly, in *State v. Verikokides*, 925 P.2d 1255 (Utah 1996), the defendant forfeited his state constitutional right to meaningful appeal where records, including key portions of the trial transcript, were lost during the defendant's seven-year flight following his conviction. *Id.* at 1258. This Court stated: "Although it is true that defendant's flight did not cause the loss of the records, his lengthy absence greatly increased the risk and indeed the likelihood that records would be lost or destroyed." *Id.* at 1257.

Similarly in this case, delay attributable to petitioner contributed to defense counsel's inability to recall any details to further the reconstruction of his cross-examination of Clark. The trial ended on February 27, 2003. R291:281. Petitioner was sentenced on April 22, 2003, and filed his notice of appeal two days later. R280-81. The trial transcripts were filed in the district court on September 9, 2003. R289-91. The court of appeals' docket indicates that petitioner did not file his motion for summary reversal based on the missing record until April 23, 2004. The court of the appeals remanded the case for a determination on reconstructing the reconstructed record on June 14, 2004. *See* Addendum B. Petitioner's trial counsel filed his response to request for reconstruction of record on December 16, 2004.

R304. The hearing on court of appeals' remand order to determine reconstruction was held on December 21, 2004. R296.

The record illustrates that six and one-half months passed from the time the trial transcripts were first available to petitioner to discover that Clark's cross-examination was missing until he filed his motion for summary reversal. Another six months passed before his counsel filed his response to request for reconstruction and the hearing was held. Virtually all of this delay was attributable to petitioner. Although this passage of time was not responsible for the loss of Clark's cross-examination, it could only have contributed to petitioner's counsel's failure to recall any specific details of the cross-examination. Petitioner bears the burden of that failure.

C. Use of the reconstructed record on appeal will not prejudice petitioner.

As an independent requirement, petitioner must also show that he was prejudiced by having to rely on a reconstructed record. *Roberts*, 1999 UT App 358, ¶ 11 (citing *Russell*, 917 P.2d at 558-59 & n.1). *See State v. Williams*, 629 A.2d 402, 406 (Conn. 1993) ("[M]ost jurisdictions hold that before a defendant can establish that he is entitled to a new trial on the ground that the reconstructed record is inadequate to review his claims, he must demonstrate specific prejudice that results from having to address his claims on appeal with the reconstructed record.") (citing numerous cases). *See also Menzies*, 845 P.2d at 241 (concluding that because no prejudicial error was found in flawed transcriptions, the defendant was not deprived of "meaningful appellate review" and, accordingly, their use on appeal would not violate due process). Petitioner has failed to show that he suffered

prejudice.

1. Petitioner was not prejudiced because his closing argument disclosed nothing more than was revealed by the reconstructed record.

As he argued in challenging the adequacy of the record, so petitioner argues that he was prejudiced because the reconstructed record was insufficient to prove that he was entrapped; that is, the record was insufficient to show that he elicited from Clark more evidence in support of entrapment at trial than he had at the entrapment hearing. Pet. Br. at 25, 27. That argument is rebutted by the foregoing discussion, and particularly by petitioner's failure to recite any significant facts in his closing argument that were not identified in the reconstructed record. Resp. Br. at Pt.B. The vigorousness with which defense counsel argued in closing, which relied on nothing more than the facts set out in the reconstructed record, further undercuts any claim of prejudice. R291:377-93.

2. Authority cited by petitioner is inapplicable to this case.

Petitioner argues that the circumstances and principles announced in *State v. Tunzi*, 2000 UT 38, 998 P.2d 816, and *State v. Taylor*, 664 P.2d 439 (Utah 1983), show that the reconstructed record is insufficient to afford him a meaningful appeal. Pet. Br. at 22-23. The argument fails on both the facts and the law.

Tunzi involved a conviction following a two-day trial. *Tunzi*, 2000 UT 38, ¶ 3. The record of the entire second day, during which half the prosecution witnesses testified, was missing, including the only witness directly implicating Tunzi—"[t]hus, fully one half of the case against petitioner [was] missing from the record." *Id.* The court noted that where a

major portion of the record was missing, attempts to reconstruct it "often prove futile because such reconstructions often fail to provide the detail necessary to resolve the issues on appeal," especially when an issue on appeal involved the sufficiency of evidence. *Id.* Because a major portion of the record was missing, the court remanded the case for a new trial to avoid needless delay. *Id.*

Taylor involved a challenge to the adequacy of the transcript of the voir dire phase of the trial. *Taylor*, 664 P.2d at 445. In forty-three pages of transcript, there were more than 35 notations of "inaudible" responses from potential jurors and one gap in the proceedings. *Id.* This court observed that "approximately 10 of the inaudible responses either came from jurors about whose impartiality there is considerable question based on other responses in the record, or they relate directly to the issue of whether the trial judge erred in not eliciting sufficient information from jurors to permit intelligent and informed jury selection." *Id.* This Court held that the trial court erred when it failed to order a new trial where the jurors' answers to those were "totally absent from the record and cannot be reconstructed by agreement of the parties." *Id.* at 447.

Neither *Tunzi* nor *Taylor* are dispositive in this case. First, neither case involved review of the adequacy of records that were actually reconstructed. *Taylor*, 664 P.2d at 447; *Tunzi*, 2000 UT 38, ¶ 3. More importantly, the mass of evidence lost in *Taylor* and *Tunzi* was far greater than in this case. In *Taylor*, substantial portions of the jury voir dire were missing, including portions relating to potential juror bias and to the adequacy of the trial court's voir dire. *Taylor*, 664 P.2d at 445-47. In *Tunzi*, one half of the record of a two-day

trial was missing, which portion included half of the prosecution witnesses, including the only witness directly implicating Tunzi. *Tunzi*, 2000 UT 38, ¶ 3. Here, by comparison, only the audiotape portion of Clark's cross-examination is missing. While the State does not suggest that Clark was an insignificant witness, whatever significance his trial examination at trial might have had, its absence has been cured by its adequate reconstruction for appeal. Resp. Br. at B. *See also Menzies*, 845 P.2d at 232 (distinguishing *Taylor* on similar basis). None of the additional authority cited by petitioner, *see* Pet. Br. at 25-26, discusses the adequacy of a record found by the trial court to have been adequately reconstructed.

3. Compelling evidence showed that petitioner initiated the arrangement to distribute drugs and that petitioner's defense lacked any credibility.

Even if the reconstructed record were not satisfactory, petitioner would not be prejudiced by relying on it on appeal. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). *See State v. Calliham*, 2002 UT ¶ 45, 86, 55 P.3d 573 (applying *Chapman* standard). *But see Menzies*, 845 P.2d at 237 (holding any transcription error concerning the date the defendant was booked, thereby throwing some doubt on whether he was the cause of the victim's identification cards being found in the jail, was harmless "given the strong evidence of guilt" and the admission of the victim's other identification cards.) In any case, no reasonable juror could fail to conclude beyond a reasonable doubt that petitioner was not entrapped because compelling evidence

showed that petitioner initiated the arrangement to distribute drugs and that petitioner's theory of entrapment lacked any credibility.

"To prove the defense of entrapment, the evidence must be sufficient to raise 'a reasonable doubt that [the petitioner] freely and voluntarily committed the offense.'" *State v. Torres*, 2000 UT 100, ¶ 8, 16 P.3d 1242 (quoting *Udell*, 728 P.2d at 132). The appellate court views the evidence of entrapment "in the light most favorable to the jury's verdict." *Udell*, 728 P.2d at 132.

The defense of entrapment is set forth in UTAH CODE ANN. § 76-2-303 (West 2004). That section provides as follows:

> It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a peace officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Id. at § 76-2-303(1).

In *State v. Taylor*, 599 P.2d 496 (Utah 1979), the Utah Supreme Court rejected the subjective standard of entrapment often applied to the statute and instead adopted an objective standard. *Taylor*, 599 P.2d at 499-500. "The focus under the objective standard is not on the propensities and predispositions of the specific defendant, but on whether the police conduct revealed in the particular case falls below common standards for the proper use of governmental power." *State v. Wynia*, 754 P.2d 667, 669 (Utah Ct. App. 1988) (citing *Taylor*, 599 P.2d at 499-500). "Under the objective test for entrapment the critical question

is whether the conduct of the government comports with a fair and honorable administration of justice." *Id.* at 669-70 (citing *Taylor*, 599 P.2d at 499-500; and *State v. Wright*, 744 P.2d 315, 318 (Utah Ct. App. 1987)). Thus, "[i]f the police conduct creates a substantial risk that an otherwise law abiding person would be induced to commit a crime, entrapment has occurred." *Id. See also State v. Richardson*, 843 P.2d 517, 520 (Utah Ct. App. 1992) (entrapment defense available where "an ordinary person in defendant's situation would be induced to commit crime").

"Entrapment, however, has not occurred if a law enforcement officer merely affords a person an opportunity to commit the offense." *Id.* (citation omitted). "'[W]here it is known or suspected that a person is engaged in criminal activities, or is desiring to do so, it is not an entrapment to provide an opportunity for such person to carry out his criminal intentions.'" *Torres*, 2000 UT 100, ¶¶ 12, 14 (rejecting claim of entrapment where the defendant "initiated and continued to pursue contact with police informant") (quoting State v. Curtis, 542 P.2d 744, 746 (Utah 1975)).

Petitioner generally makes only vague, unsupported assertions about having elicited more information from Clark at trial than at the entrapment hearing. Aplt. Br. at 25, 27. The only substantive point that petitioner makes in support of his entrapment claim is that Clark said he "urged" petitioner. *Id.* But compelling evidence, entirely apart from anything petitioner might have elicited from Clark on cross-examination, rebuts that any contact Clark had with petitioner induced him to commit the charged offense when he was not "otherwise ready to commit it." In fact, the evidence shows that petitioner initiated the offense.

On cross-examination at trial, petitioner elicited from Clark that he said that he "urged" petitioner to call Buckley. This is evident because the prosecutor addressed the matter on redirect examination. R289:127. Clark explained that he "[did not] recall *urging* [petitioner 'to call the med tech'] the first time." R289:127 (emphasis added). Clark, evidently referring to his entrapment hearing testimony, said that he used the word "urge" because it was "the least of the four" choices presented to him by the prosecutor. *Id.*[6] "I don't recall I ever urged him," Clark continued. "He was always a hundred percent ready to go, pretty excited about [unintelligible] urging him." *Id.* When asked how persuasive he had to be to convince petitioner that he had "a rich connection on the outside," Clark responded: "I didn't have to be. Mr. Gardner initiated this—this bringing drugs in to begin with.... He was looking for a connection on the streets—somebody to pick the dope up." R289:127-28. Clark also said that another inmate confirmed what petitioner had told him, that the med tech had distributed prescription drugs that were not prescribed to inmates. R289:128. This testimony was consistent with Clark's testimony on direct examination that petitioner first approached him about bringing drugs into the prison through a med tech, who was his friend. R289:115-17. Petitioner did not conduct recross-examination.

More significantly, other compelling evidence supported that petitioner "acted freely, initiated the plan and made an agreement with Pepper to smuggle drugs into the prison for distribution." *See* Order. A basic theme of the defense was that petitioner was naive from

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[6] Clark was responding to a question relating to his testimony "on the 13th of December," the date of the entrapment hearing, wherein petitioner cross-examined him on his having "urged" petitioner to become involved in the drug plan. R289:127; 288:47.

the beginning about arranging to bring drugs into the prison and that he only went along out of fear of reprisal. R291:282–305. In support, petitioner testified that he called Pepper because he thought that Pepper could get Buckley a job, possibly repossessing cars or making deliveries, and that he did not know until after his telephone conversation with Pepper on February 12 that his dealings with Pepper involved drugs. R291:283, 285, 309. Petitioner claimed that he did not know how the manila envelopes figured in the arrangement. R291:288-89. Petitioner perceived Pepper's comments that he was going to New York and did not want petitioner to "get his ass in a jam" as a threat if he did not follow through on the arrangement. R291:290, 293, 319.

Listening to petitioner's telephone conversations with Pepper decimates this defense and petitioner's credibility.[7] The February 12 conversation begins with Pepper's banter about having to buy Valentine's Day gifts and expressing empathy for the "outrageous" cost of petitioner's prison phone calls, and ends with chatter about petitioner's father. *See* Transcript of 2/12/01 telephone call, R128-33, 141-42 (Addendum E). When Pepper suddenly changes the subject and says, "[W]hat're we lookin' at? A whole 'Z,' half 'Z,'" petitioner seamlessly responds, "Um, he was sayin' somethin' about a whole one and I think he'll probably go with that if it can be . . . worked the right way." R133. When Pepper expressed surprise that so much contraband could be taken in at once, petitioner indicated that the drugs would come into the prison in "little manila envelopes." *Id.* Soon afterward, petitioner says that he has

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[7] Although the conversations are transcribed, the State urges the Court to listen to the audiotapes, as petitioner's voice and the flow of conversation underscore petitioner's immediate and knowing involvement and rebut any suggestion of intimidation or naivete.

told Buckley, "'It's relatively safe. You're dealing with me.... So, you don't have to worry about anybody else .... You just get what you gave me, bring it to me and you know how that goes.'" R.136.

In their February 16 telephone conversation, petitioner describes to Pepper how the inmates come out of their cells and that he has a pretty good cell. *See* Transcript of 2/16/01 telephone call, R146-47 (Addendum F). Pepper, commiserating with petitioner on the difficulties of prison life, says, "[C]ells can be pretty bad if you live with someone that you don't like." R147. Later, Pepper simply mentions that he is going to New York for the weekend. R152. When Pepper later says that he does not want to see petitioner or Clark "get your ass in a jam," the context is clearly not one of threat but of protecting them from having to make unsafe moves in the prison. R154-55. When Pepper asks if he should bring in one "black," petitioner answers, "Yeah, if you wanna, go ahead . . . ." R155. Immediately afterward, petitioner says, "[W]e'll go ahead and get things rollin'" *Id.*

These recorded conversations irrefutably show that when petitioner called Pepper, he knew that he was initiating a drug deal. The conversations also fully discredit his claim that he was intimidated into continuing in a plan that he had no taste for.

The foregoing evidence demonstrates that petitioner was not prejudiced by having to rely on the reconstructed cross-examination. As the court of appeals noted in denying petitioner's motion for summary reversal based on the absence of Clark's cross-examination,

> [e]ven presuming Clark's cross-examination elicited testimony that was not supportive of the State's case, and supportive of [petitioner], it would be only inconsistent evidence which the jury apparently chose not to give much

> weight. "When reviewing a trial wherein conflicting competent evidence was presented, appellate courts simply assume that the jury believed the evidence supporting the verdict." *State v. Boyd*, 2001 UT 30, ¶ 14, 25 P.3d 985.

See Order (Addendum B). *See also Menzies*, 845 P.2d at 238 (recognizing that an appellate court would not consider conflicting evidence in ruling on an insufficient evidence claim); *Curtis*, 542 P.2d at 747 (finding significant in upholding denial of motion for a directed verdict based on entrapment that the defendant's testimony merely contradicted the undercover agent's testimony). The State does not contend that the foregoing rationale should have been the court of appeals' principal argument for affirmance. Nevertheless, it puts in perspective any possible deficiency in the reconstructed record alongside the very compelling evidence of petitioner's guilt. In sum, even if the reconstructed record were inadequate for use on appeal, petitioner was not prejudiced.

CONCLUSION

Based on the foregoing arguments, due process does not require that petitioner's conviction be reversed.

RESPECTFULLY SUBMITTED this 22nd day of November, 2006

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, this 22nd day of November, 2006, to:

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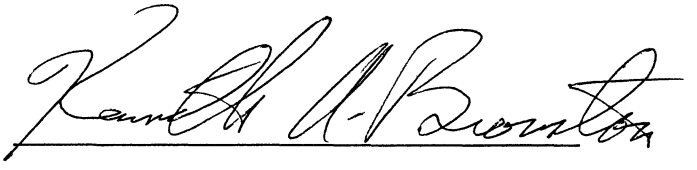

Addenda

Addendum A

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Randy Shea Gardner, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20030371-CA F I L E D (January 26, 2006) 2006 UT App 21

Third District, West Valley Department, 011103725
The Honorable Terry L. Christiansen

Attorneys: Margaret P. Lindsay, Orem, and Patrick V. Lindsay, Provo, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake City, for Appellee

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Before Judges Bench, Billings, and Thorne.

PER CURIAM:

Randy Shea Gardner appeals his conviction of arranging for the distribution of a controlled substance. He asserts that his conviction should be reversed and the case remanded for a new trial because the record is insufficient for a meaningful appeal. He also argues that a jury instruction was in error.

Criminal defendants have the right to a "record of sufficient completeness to permit proper consideration of [their] claims." State v. Menzies, 845 P.2d 220, 241 (Utah 1992) (internal quotations and citation omitted). They do not, however, have a right to a perfect transcript. See id. Rather, the record must be adequate to allow meaningful judicial review. See id.

"Due process requires that there be a record adequate to review specific claims of error already raised." West Valley City v. Roberts, 1999 UT App 358, ¶11, 993 P.2d 252 (internal quotations and citation omitted). Appellate courts will not presume error where a record is incomplete. See id. A lack of a complete record will be a "basis for remand and a new hearing only where: (1) the absence or incompleteness of the record

prejudices the appellant; (2) the record cannot be satisfactorily reconstructed (i.e., by affidavits or other documentary evidence); and, (3) the appellant timely requests the relevant portion of the record." Id.

An incomplete record may necessitate a new trial where a defendant shows that a specific error is asserted and that the missing record was critical to its resolution. See State v. Russell, 917 P.2d 557, 559 (Utah Ct. App. 1996). A defendant is not entitled to a new trial whenever there is a gap in the record, "just in case the missing record might reveal some error." Id. Rather, a showing of prejudice is required. See id. Gardner has not shown that the gap in the record has prejudiced him.

Gardner asserts that the record on appeal is inadequate to determine whether there was sufficient evidence to support his conviction. He argues that the absence of the cross-examination testimony of Leland Clark means that this court cannot review whether there was sufficient evidence to show the "lack of entrapment." However, the record on appeal is complete enough to determine whether Gardner freely and voluntarily committed the acts in question because the State's case-in-chief is complete and the missing testimony would, at most, be inconsistent or contrary evidence.

A conviction may be overturned for insufficiency of evidence only "when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime." State v. Boyd, 2001 UT 30,¶13, 25 P.3d 985 (quotations and citation omitted). Moreover, "[i]t is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses." Id. at ¶16. "When reviewing a trial wherein conflicting competent evidence was presented, we simply 'assume that the jury believed the evidence supporting the verdict.'" Id. at ¶14 (quoting State v. Dunn, 850 P.2d 1201, 1213 (Utah 1993)). Ultimately, in determining the sufficiency of the evidence, "so long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." Id. at ¶16.

The record is complete enough to determine that the State presented sufficient evidence for a jury to find that Gardner acted freely and voluntarily, and was not entrapped into committing the offense. The evidence showed that Gardner initiated the plan of bringing drugs into the prison, lacking only an outside supplier. Gardner demonstrated his willingness to participate in this enterprise. Kevin Pepper provided Gardner

the opportunity to commit the offense by posing as an outside supplier, with Clark passing on certain contact information to Gardner. The phone conversations between Gardner and Pepper show no hesitation or confusion from Gardner in participating in a drug distribution agreement.

Even assuming that Clark's cross-examination testimony supported Gardner's defense that he was entrapped into committing the offense due to concern for his own safety and concern for a friend's financial circumstances, the testimony would present only inconsistent evidence, which the jury obviously chose not to believe. There is testimony from Clark stating that Gardner initiated the idea of bringing drugs into prison, and testimony from Pepper regarding the further arrangements. Where conflicting evidence is presented at trial, appellate courts "simply assume that the jury believed the evidence supporting the verdict." Id. at ¶14 (internal quotations and citation omitted). Given the evidence supporting the verdict, the presumption is that the jury simply did not give any significant weight to any possible testimony from Clark that would have supported entrapment. As a result, Gardner has not shown any prejudice due to the missing portion of the record.

Gardner also argues that the missing testimony is necessary to identify any other possible errors at trial. However, a defendant is not entitled to a new trial whenever a gap in the record exists just in case the gap may contain some error. See State v. Russell, 917 P.2d 557, 559 (Utah Ct. App. 1996). Gardner overstates Russell as mandating reversal where a record is incomplete. In fact, Russell held that an incomplete record does not on its own require a new trial. See id. The court noted that Utah law "does not require a complete record so appellate counsel can go fishing for error; it only requires that there be a record adequate to review specific claims of error already raised." Id.

Gardner also asserts that the trial court erred in giving an instruction regarding the elements of entrapment. When challenging jury instructions on appeal, an appellant "cannot take advantage of an error committed at trial when that [appellant] led the trial court into committing the error." State v. Geukgeuzian, 2004 UT 16,¶9, 86 P.3d 742 (quotations and citation omitted). As a result, a jury instruction may not be assigned as error "'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" Id. (quoting State v. Hamilton, 2003 UT 22,¶54, 70 P.3d 111). Counsel affirmatively represented to the trial court that he had no objection to the

specific instruction now appealed. Thus, Gardner is precluded from challenging this instruction on appeal.

Accordingly, Gardner's conviction is affirmed.

Russell W. Bench,
Presiding Judge

Judith M. Billings, Judge

William A. Thorne Jr., Judge

Addendum B

Uel

JUN 15 2004

FILED
UTAH APPELLATE COURTS

JUN 14 2004

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	
	)	
Plaintiff and Appellee,	)	ORDER
	)	
v.	)	Case No. 20030371-CA
	)	
Randy Shea Gardner,	)	
	)	
Defendant and Appellant.	)	

This matter is before the court on Appellant's motion for summary reversal and the State's motion for remand to supplement the record.

Criminal defendants have the right to a "record of sufficient completeness to permit proper consideration of [their] claims." State v. Menzies, 845 P.2d 220, 241 (Utah 1992) (internal quotations and citation omitted). They do not, however, have a right to a perfect transcript. See id. To establish a basis for reversal and a new trial, Gardner must show that the incompleteness of the record prejudices him, and that the record cannot be satisfactorily reconstructed. See West Valley v. Roberts, 1999 UT App 358,¶11, 993 P.2d 252.

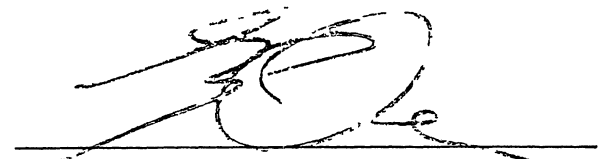
Gardner has not shown how he is prejudiced by the lack of Clark's cross-examination testimony. Even presuming Clark's cross-examination elicited testimony that was not supportive of the State's case, and supportive of Gardner, it would be only inconsistent evidence which the jury apparently chose not to give much weight. "When reviewing a trial wherein conflicting, competent evidence was presented, [appellate courts] simply assume that the jury believed the evidence supporting the verdict." State v. Boyd, 2001 UT 30,¶14, 25 P.3d 985 (internal quotations and citation omitted). Evidence was presented supporting that Gardner acted freely, initiated the plan, and made an agreement with Pepper to smuggle drugs into the prison for distribution.

Gardner has also not shown that the record could not be reconstructed sufficiently to provide appellate review. In this case, entrapment was a highlighted issue on defense, and was the subject of a separate motion and hearing earlier in the proceedings. At the earlier hearing, Clark was cross-examined in an effort to show that Gardner was entrapped and the charges should be dismissed. The hearing cross-examination, along with notes or other documentary material, may be useful in reconstructing a record. The State's motion for remand suggests this tack, and requests remand to the trial court to determine if the record may be reconstructed adequately.

IT IS HEREBY ORDERED that Gardner's motion for summary reversal is denied. IT IS FURTHER ORDERED that the State's motion for remand is granted, and this case is remanded to the trial court for a determination on reconstructing Clark's cross-examination to provide a more complete record on review.

Dated this 14th day of June, 2004.

FOR THE COURT:



Gregory K. Orme, Judge

Addendum C

ORIGINAL

Status Mtg
12-21-04
1:00
TC

Edwin S. Wall, Utah Bar No. 7446
WALL LAW OFFICES
8 East Broadway, Ste. 500
Salt Lake City, Utah 84111
Phone Number: (801) 523-3445
Email: wallsec@xmission.com

IN THE THIRD JUDICIAL DISTRICT COURT
STATE OF UTAH, WEST VALLEY DIVISION

STATE OF UTAH,	)	
	)	Case No.: 011103725
Plaintiff,	)	
	)	
v.	)	
	)	
RANDY GARDNER,	)	Hon. Terry L. Christensen
	)	
Defendant.	)	

DEFENSE COUNSEL'S RESPONSE TO REQUEST FOR RECONSTRUCTION OF THE RECORD

COMES NOW Edwin S. Wall, counsel for the defendant at the time of the trial in the above-entitled matter, and submits his response to the Courts directive that he reconstruct the records.

On February 26, 2003, the prosecution called Leland Clark to testify at the trial of Randy Gardner. Because of a tape malfunction the critical cross examination of Mr. Clark, establishing the defense of entrapment, has been lost. The case was tried nearly two years ago and defense counsel did not make notes of the answers given by Mr. Clark to the questions asked during cross-examination. It is impossible to relate the exact statements made, or even to provide a summary sufficient to constitute the record of the events. My cross examination was based on targeted objectives, not written out questions, and I did not take notes of the answers given.

While the *Government's Response* is in the form of a narrative, I know that Mr. Clark's cross examination was conducted using leading questions. Additionally, it is my usual practice to jump from one topic to another, the back, to test the memory of a witness.

My perception of the cross examination is that the defense of entrapment was fully met, and that Mr. Clark acknowledged that he was acting as an agent for the government, that Mr. Clark and Officer Pepper designed a plan which Mr. Clark then coerced Mr. Gardner to follow. While the government's *First Response to Request for Reconstruction of the Record (Government's Response)* only indicates once, on page 2, that Mr. Clark "urged Gardner to make arrangements with the phone call" my perception of the testimony is that Mr. Clark's testimony as to the urging of Mr. Gardner was more extensive, that Mr. Clark made a number of statements using the word "urge" in the context of getting Mr. Gardner to make the call or calls, and that testimony indicating the coercive environment in the jail was given.

Of significance in my perception of Mr. Clark's cross examination was his acknowledgment at trial that he was living in close quarters with Mr. Gardner and that Mr. Clark had to "urge" Mr. Gardner to place phone calls which were supposed to be made in accordance with the plan. At the time I perceived that the trial court erred as to its ruling on the issue of entrapment and that on appeal the trial court would be reversed. Additionally, my perception is that Mr. Clark's testimony differed in the significant way from the testimony he had previously given at the pretrial evidentiary hearing in that Mr. Clark had to be coercive in getting Mr. Gardner to make the telephone calls.

Respectfully submitted this 14th day of December, 2004.

Edwin S. Wall, Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2004, a true and correct copy of the foregoing document was served by depositing the same in the United State Mail, first class postage prepaid, addressed as follows:

James M. Cope
Deputy District Attorney
2001 South State Street, S 3700
Salt Lake City, Utah 94190

Edwin S. Wall

Addendum D

DAVID E. YOCOM
District Attorney for Salt Lake County
JAMES M. COPE, 0726
Deputy District Attorney
2001 South State S3700
Salt Lake City, Utah 84190
Telephone: (801) 468-3422

IN THE THIRD DISTRICT COURT, WEST VALLEY DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- RANDY GARDNER, Defendant.	FIRST RESPONSE TO REQUEST FOR RECONSTRUCTION OF RECORD Case No. 011103725 Judge Terry L. Christiansen

In response to the Court of Appeals' Request for Reconstruction, the State of Utah, by and through its attorney, James M. Cope, having consulted the tape recordings of the proceedings, the notes made by the prosecutor during the trial, the transcripts of an earlier proceeding involving the same witness and defense questions, and the prosecutor's recollection of the trial, hereby submits that during the cross-examination of prosecution witness Leland Clark, which commenced on 26 February 2003, that witness testified substantially as follows:

I was first sentenced to prison in 1989 for bad checks and fraud. I have spent about eight years in prison since then, but not continuously. The last time I was in prison was for attempted securities fraud. That is what I was in for in February of 2001.

I met and began talking with Randy Gardner at the prison in August of 2000. I saw Buckley, the Medtech, talking to Gardner during pill line in early January of 2001. I went to Kevin Pepper on January 10th to tell Pepper what Gardner said to me about the medtech. I just told Pepper what I heard Gardner say. I did not exaggerate anything.

When I talked to Pepper, I wanted some special considerations from the prison officials. I wanted a letter to the Board of Pardons recommending an early release for me, and I wanted a transfer to another prison in another state. I knew that I would have a rough time staying in the general prison population after being a snitch.

I wasn't talking to Pepper about anyone but Gardner and Buckley during 2001. I gave Pepper some kites from Gardner, but I don't remember if I gave him kites from anyone else.

During the time in January and February 2001 that I was talking with Gardner about Buckley, I remember that Gardner said Buckley was having some financial difficulties. Gardner said that Buckley hoped to pay off some of his bills with his share of the money that we would get from bringing the drugs in. Gardner did seem to be concerned about Buckley's circumstances. According to Gardner, Buckley could not meet his monthly bills and was looking at going bankrupt. I knew that the two of them had a relationship for many years before 2001. Gardner and Buckley's wife were close personal friends.

No heroin or cocaine had ever been brought into the prison that I knew about. I never saw Buckley bring any controlled substance into the prison. I just told Pepper what I had heard Gardner say. Gardner never said that Buckley brought in any heroin or cocaine; it was prescription pills that he was talking about.

Kevin Pepper listened to what I had to say the first time I talked to him and told me to keep him informed. He told me the benefits I would receive if I provided further information to him, and I knew that I would have to provide further information in order to get the letter for the Board of Pardons and the change in housing.

Gardner talked to me about the way we were going to get the cocaine and heroin into the prison shortly after 10 January 2001 when he returned to Unit 4. He said that he would be able to get drugs the same way we got prescription pill---with the pill cart.

My conversations with Gardner were never recorded, but Pepper recorded the phone calls that Gardner made to him. I urged Gardner to make the arrangements with the phone call and everything, but he was excited on his own about making some money. We talked about it almost every day, especially after we had someone to be the connection. I told Gardner that the

connection was a moneybags, that the connection was wealthy and well off, and that he could give Buckley a job where he could make a lot of money to deal with the bankruptcy problem he was facing.

Randy got the phone number for the outside connection from me. He told me a couple of days later that he had called the medtech. I never talked to the medtech except in the pill line.

I did receive a transfer out of the state after March of 2001, but I am now back at Utah State Prison to testify in this trial. I am hoping for a two year cut in my time for testifying, but I haven't received it yet.

Conclusion of the Cross-Examination. The Court recessed until 1510 hours.

AT WHICH POINT THE TESTIMONY OF THE WITNESS CONTINUED DURING RE-DIRECT EXAMINATION as follows:

Other than what I have already testified, I do not recall ever having to urge the defendant to make any telephone calls.

At which point the official record appears to resume without further interruption.

DATED this 17th day of November, 2004.

DAVID E. YOCOM
District Attorney

James M. Cope

JAMES M. COPE
Deputy District Attorney

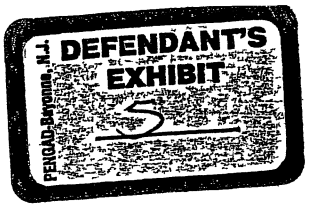
CERTIFICATE OF MAILING

I hereby certify that on the 19th day of November, 2004, a true and correct copy of the foregoing First Supplemental Response to Request for Discovery was mailed to the attorney listed below.

James M. Cope
Deputy District Attorney

Edwin S. Wall
Attorney at Law
500 Judge Building, 8 East Broadway
Salt Lake City, Utah 84111

Addendum E



TAPED CONVERSATION

Conversants:	Randy Gardner/USP #21535 Kevin Pepper
Investigator:	Kevin M. Pepper Law Enforcement Bureau (Draper)
Date of Call:	February 12, 2001
Time:	1604 Hours
Length of Call:	Side 1 of Tape – 13 Minutes 42 Seconds
Place:	Utah State Prison

Taped Telephone Conversation:

(Telephone Ringing)

PEPPER: Hello.

U.S. West: U.S. West has a collect call from inmate "Leland Clark", at the Utah State Prison. To refuse this call, hang up. If you accept this call, do not use three-way or call waiting features or you will be disconnected except for legal calls. This call may be recorded or monitored except for approved, privileged legal communications. To accept this call, dial 1 now.

(1 is dialed.)

Thank you.

GARDNER: Hello.

PEPPER: Yes...(Inaudible)...

GARDNER: (Laughter) Well, actually, this, this isn't Leland. This is...

PEPPER: Oh shit! That's right.

GARDNER: Yeah, it's actually another guy. Uh...

PEPPER: I've got a real bad connection....

GARDNER: [redacted]

PEPPER: Hey, hang on for a minute. I'm just walkin' out of the mall.

GARDNER: OK.

PEPPER: ...like crazy in here. I don't know if you can hear it.

GARDNER: Yeah. I can.

PEPPER: Ooohhh. Damn! That one was nice.

GARDNER: (Laughter)

PEPPER: God! I love these malls!

GARDNER: Yeah, I bet.

PEPPER: OK. Can you hear me? You there? Hello.

GARDNER: Is that better?

PEPPER: Can you hear me?

GARDNER: Yeah, I can.

PEPPER: OK. Now I got ya'.

GARDNER: OK. Yeah. Sometimes I gotta' play with the phone here too. Um, I got a phone number for ya'.

PEPPER: Oh, OK.

GARDNER: [redacted]...

PEPPER: Oh, just...(Inaudible) I'm havin' a .....in fact, I've got a diesel goin' by me now. Jesus! 955-...

GARDNER: [redacted]

PEPPER: 95...

GARDNER: 74.

PEPPER: 74?

GARDNER: Uh huh. [redacted].

PEPPER: And just give him a call?

GARDNER: Right. I just, I just sent a letter off to him today. I tried to catch him. He's kinda' "hit and miss" 'cause he works two jobs.

PEPPER: Uh huh.

GARDNER: So, I kinda' have a hard time catchin' him here unless I can get out after dinner here. But, uh, if you want, give him a call. Tell him Shay said to call.

PEPPER: Tell him Shay said to call?

GARDNER: Right.

PEPPER: OK.

GARDNER: Or you can say.....He knows me by both.....

PEPPER: Wait a minute. Let me get in fuckin' car. I can't hear shit out here. Hey! Never get yourself an "old lady".

GARDNER: Right. (Laughter)

PEPPER: Valentine comes up. You gotta' go buy all that good heart shit and make everybody feel good.

GARDNER: You know? (Inaudible) I know. I just got bombarded by havin' to draw 31 cards today. So...

PEPPER: You just what?

GARDNER: I just got bombarded havin' to draw 31 cards today for my best friend's little sister.

PEPPER: Oh shit!

GARDNER: Uh, I promised her, if she got her grades up I promised her I'd do somethin' nice for her, so...

PEPPER: Did she get the grades up?]

GARDNER: Yeah. She got 'em up.

PEPPER: Good deal.

GARDNER: That's what she picked. "Will you draw Valentine's Day cards for my class?

PEPPER: (Laughter)

GARDNER: I'm like, "Gee! Thanks!"

PEPPER: OK. Did he talk to you about getting my name on your list?

GARDNER: Yeah. He sure did. I'm, uh, I just filled it out and I'm puttin' it in tonight so...

PEPPER: OK.

GARDNER: ...out in the morning. But, uh, if you get hold of 'im, let him know I said to call and, like I said. I just sent him off a letter 'cause it's kinda' hit and miss for me here.

PEPPER: Uh huh.

GARDNER: So, and I prefer to talk to him versus his wife. (Laughter)

PEPPER: OK.

GARDNER: (Inaudible)

PEPPER: And just tell 'im Shay called. Told me to call ya'?

GARDNER: You'll tell him "Shay said to call" and, it's in reference to the information I was talkin' to him about. He'll know. So?...

PEPPER:! OK.

GARDNER: Uh...

PEPPER: And, uh, I just wanna' get a couple of things clear 'cause, I don't know what the fuck it is but my, when I get my calls forwarded to this number?

GARDNER: Uh huh.

PEPPER: I, it's, my reception is just the shits!

GARDNER: Right.

PEPPER: I mean, I can't hear, I can't hear shit but, I can hear you just semi but, yeah, a lot of times talkin' to the others it's, it's a bitch.

GARDNER: Yeah. I know my aunt goes through the same thing with hers.

PEPPER: Yeah, and the fuckin' prison, they're rippin' everybody off with these God damn phone calls.

GARDNER: Oh yow. It's, well, after nine it's $2.11 for a local call and if you attach a cell phone it's like 69cents a minute.

PEPPER: ...well, yeah, but I'll pay that but...yow, you know, two bucks for a phone call!

GARDNER: Yow.

PEPPER: Give me a break!

GARDNER: Yeah. It's outrageous.

PEPPER: Give me a break. Yeah.

GARDNER: But it's even worse when I call home because I call Washington State and it's like $30.00 a call. (Laughter)

PEPPER: Oh God! I hope you don't call too often?

GARDNER: No, I call 'em like once a month. I tell 'em they're lucky if I call then. So...

PEPPER: ...Uh, well now, Lee was sayin', uh, that, what're we lookin' at? A whole? "Z" half "Z"?

GARDNER: Um, he was sayin' somethin' about a whole one and I think he'll probably go with that if it can be, can be worked the right way.

PEPPER: OK.

GARDNER: So...

PEPPER: Is he gonna' be able to get it all in at once? I mean. That's a shit load to take in at once.

GARDNER: Yeah, I, I, I figure he should be able to, um... I wish I had. Shit! I don't have one to put up. I was thinkin' like the little envelopes for, like if you go to the dentist or somethin'?

PEPPER: Uh huh.

GARDNER: You get like, a little manila envelope? Well, basically, that's how it's gonna' come. So...

PEPPER: So, it's not all gonna' come at once then?

GARDNER: Probably not. So...

PEPPER: Can we trust this guy?

GARDNER: Yeah. I've known him for a while, so...(Laughter) He's, he's pretty...

PEPPER: Has he done it before for ya'?

GARDNER: No, but actually, that's pretty much one of the reasons he got hired on [redacted] here.

PEPPER: Ooohh! Cool!

GARDNER: Yeah. (Laughter)

PEPPER: God! I like this.

GARDNER: Yeah. So...You can kinda' say that.....under my thumb. (Laughter)

PEPPER: Um-kay. Hey, uh, I have some access to some black that just come upon [redacted]

GARDNER: Uh huh.

PEPPER: Uh, any...any market for it in there?

GARDNER: Uh, I can probably check around and see what I can find out. I know there's a lot more of 'em getting' ready to go. There's a big market there. Here it's just, uh, everything's really...

PEPPER: Where you're goin'?

GARDNER: Yeah.

PEPPER: You're leavin', you're leavin'.....

GARDNER: Well, I should be getting' my Level 3 here shortly. I think...

PEPPER: What does that mean?

GARDNER: I think Lee was tellin' you that he mentioned it to...but...

PEPPER: Oh, just moved out of that?

GARDNER: Yeah.

PEPPER: OK. God! You said that and I'm like, "Oh my gosh! You're moving out of this prison now?"

GARDNER: No, actually movin' out of Max back to.....

PEPPER: OK. Now, yeah. You, you scared the shit out of me.

GARDNER: (Laughter) No. But, uh, I know there's a lot more out there than here.

PEPPER: OK. I'll tell you what. Why don't you, uh, find out.

GARDNER: OK.

PEPPER: Um, find out if you can move any of that for me?

GARDNER: OK. I will.

PEPPER: Uh, and then for, let's see, for Don it's what, five ones?

GARDNER: Yeah.

PEPPER: OK. And that's where one "Z" of White?

GARDNER: Right.

PEPPER: What's a, what is he gonna' do if we get, uh, if we're able to move some black or somethin'?

GARDNER: Um, I'm sure he'll probably be negotiable and stuff. Uh, I haven't told him a whole lot what it's gonna' be or anthing like that. I guess...

PEPPER: Well, shit! I don't wanna' be callin' him unless he knows what's goin' on!

GARDNER: Well, he knows, he knows that I, this is what I told him. I said, "I got a way for you to make some extra cash for I know you're hurtin'." And I told him, "It's relatively safe. You're dealin' directly with me." I said, "So, you don't have to worry about anybody else, any headaches or hassles, you just get what you gave me, bring it to me and you know how that goes." And he said, "OK. No problem."

PEPPER: So, he knows...

GARDNER: (Inaudible)

PEPPER: ...that I'm gonna' be callin'?

GARDNER: Yeah. He knows somebody's gonna' call.

PEPPER: OK.

GARDNER: And, uh, that it, that he's just gonna' come...you know what I mean? All he's gotta' do is come see me.

PEPPER: (Laughter) OK. Cool.

GARDNER: That way, it minimizes it and he doesn't have to worry about anything else. So, and I told him, I said, "You'll be takin' care of." I said, "You won't have to wait for forever. You'll be taken care of."

PEPPER: Then, that's the other thing. What about, how we gonna' do this on, uh, I have a P.O. Box at...

GARDNER: Uh huh.

PEPPER: What about , uh...you can just tell, when you're movin' it in there, just tell 'em to send it out to this P.O. Box?

GARDNER: Yeah. Yowp. Can Jeff boy do it that way? I think I've got one I can trust is (Inaudible) too if I need an extra one to go anywhere.

PEPPER: OK. You got a paper on ya'?

GARDNER: Um, I do, but I don't have a pen on me right this second. Hang on and I'll grab a pen.

PEPPER: OK.

GARDNER: All right. OK.

PEPPER: OK. It's P.O. Box 142...

GARDNER: P.O. Box 142.

PEPPER: Fuck! I think it's...well, I think it's, it's P.O. Box 142, West Jordan.

GARDNER: OK.

PEPPER: 84084. Don't have anyone send anything yet. I need to ver...I, yeah, I gotta' make sure if that's the right...I haven't used it for a long time, so...

GARDNER: OK.

PEPPER: But, I'm pretty sure that's it.

GARDNER: OK. There's not a problem.

PEPPER: Uh, what about, OK. You know, we start movin' this stuff, what kinda' break are we getting' on this. Uh, what do you, what do you want out of it? and what am I getting' out of it? ...

GARDNER: (Inaudible)

PEPPER: You're the one takin' most of the chances, so...

GARDNER: Well, I told Lee, really because I got...due to my friend, and I'll probably, when I finally do parole and I go to their house so, really, it's beneficial for me to help the two of ya'.

PEPPER: (Laughter) So, do you want me to just hold onto everything?

GARDNER: Yeah, if you want, or...

PEPPER: OK.

GARDNER: .....for me, really, I'm just, I'm doin' it more to help my friend out than anything. Like I said, he got on out here and he's, he's had some problems with his bills. And so, I guess that I've known him for a while.

PEPPER: (Inaudible) He got hired on just so he could move this shit?

GARDNER: Well, he took the fuckin'grave. Pulled on it and he's tryin' to get Post Certified.

PEPPER: Huh?

GARDNER: He's tryin' to get Post Certified?

PEPPER: What's that?

GARDNER: Well he's, he's done like, he used to be a fire fighter back East, but he's tryin' to get his Post Certs so he can carry firearms, stuff like that.

PEPPER: What is a Post Cert?

GARDNER: Uh, where you might carry a firearm, you go through all your academy training.

PEPPER: Oh! Police shit!

GARDNER: Yeah. And, uh, so, he's been tryin' to get his Post Certs and it was a way for him to get...

PEPPER: Are you there?

GARDNER: Yeah. And...

PEPPER: You there?

GARDNER: Yow. I'm still here. So, it's a way for him to get in and get that.

PEPPER: (Laughter) Damn! How much is that gonna' cost?

GARDNER: Um, I'm not sure. I, I, he got told if he could stay on here long enough, the place out here will pay for it. So...

PEPPER: You there?

GARDNER: Yup. Still here.

PEPPER: Hello.

GARDNER: Hello.

PEPPER: My, I had to plug my phone in.

GARDNER: (Laughter)

PEPPER: I think my battery is dyin' on me 'cause you keep fadin' out on me.

GARDNER: Right. Plus, these phones here are junk. But, uh, so, I'm not sure what that's gonna' run him. It shouldn't run him anything if he can get 'em to pay for it.

PEPPER: Um kay. Uh, I'd feel a whole lot better if you got hold of him, you know...

GARDNER: (Inaudible)

PEPPER: Hang on...

GARDNER: All right.

PEPPER: Wait a minute.

GARDNER: (Laughter)

PEPPER: Let me move around.

GARDNER: OK.

PEPPER: Is that any better?

GARDNER: Yow.

PEPPER: OK.

GARDNER: I can hear you better. But, what I did was, I just barely put a letter to him in the mailbox. It'll go out first thing in the morning. So, he should have it, uh, Wednesday. Wednesday, Thursday at the latest.

PEPPER: Um kay.

GARDNER: What if I give him your phone number to get hold of you there?

PEPPER: OK.

GARDNER: And, uh, so, if you want, you can wait and, if you don't hear from him by Thursday, give them a call.

PEPPER: OK. Yeah, 'cause I'm headin' out of town here in a little. I don't know what day I'm gonna' be leaving.

GARDNER: Uh huh.

PEPPER: But, either the first of this, or the end of this week or the first of next week, I'm gonna' be leavin' town.

GARDNER: Right. And I was, and I was talkin' to Lee and I said, "Huh, he might even know my dad if he's lived out in that neighborhood for a while.

PEPPER: (Laughter)

GARDNER: Oh. He said, "What do you mean?" I said, "Well, my dad grew up out in Murray." So...

PEPPER: Well, it's over there on the West side.

GARDNER: Yeah, uh, my dad's name is Randy Gardner also. So, he used to live right off of, uh, I think it's...7th West, by Hidden Village.

PEPPER: Uh, shit, I'm off of 45th South and 7th West.

GARDNER: So, not too far.....

PEPPER: Nah! Hell, he's just a little bit...

GARDNER: (Laughter)

PEPPER: ...little bit, little bit to the, uh, what direction is that, South.

GARDNER: Yeah, a little bit...

PEPPER: He's just South of me.

GARDNER: Yow.

PEPPER: Well, cool. OK. Hopefully I'll hear from him. If not, um, hell, I'll just, uh, give him a call at the end of the week or somethin'.

GARDNER: OK.

PEPPER: And, uh...You know, if you get hold of him I'd feel a whole lot better. ...will it matter if you call? Can you call me again if I'm not on your phone list?

GARDNER: Um, well, I've got Lee's number, so, if I need to, I can just call you on his.

PEPPER: OK.

GARDNER: OK.

PEPPER: Sounds cool. Let's do it.

GARDNER: All right. Sounds good.

PEPPER: And, uh, hell. Hopefully...be, let's see, 955-9574?

GARDNER: Uh huh.

PEPPER: OK. He's on.

GARDNER: And his name's Don.

PEPPER: (Inaudible)

GARDNER: If, if you don't catch him...the machine should be on. They've got an answer machine, so, like I said, I kinda' play hit and miss with 'em sometimes, 'cause they ball park two jobs.

PEPPER: (Inaudible)

GARDNER: So, it might be phone tag for a second.

PEPPER: Well, that's why I got this damn cell so I could stay in touch.

GARDNER: Uh huh.

PEPPER: Take care of business and shit, so. OK. Cool.

GARDNER: All right. Well, thank you sir and...

PEPPER: Yeah, give me, uh, you know, if you know or you talk to, uh, Don?

GARDNER: Uh huh.

PEPPER: Uh, give me a buzz back and let me know that, you know, he's up and...and he's ready to go.

GARDNER: OK.

PEPPER: OK?

GARDNER: All right. Sure will.

PEPPER: Talk to you later.

GARDNER: All right. See ya'.

PEPPER: Bye.

GARDNER: Bye.

END CONVERSATION

Addendum F

TAPED CONVERSATION

Conversants:	**Randy Gardner/ USP #21535** **Kevin Pepper**
Investigator:	**Kevin M. Pepper** **Law Enforcement Bureau (Draper)**
Date of Call:	**February 16, 2001**
Time:	**1325 Hours**
Length of Call:	**Side 1 of Tape - 09 Minutes 04 Seconds**
Place:	**Utah State Prison**

Taped Telephone Conversation:

PEPPER:	Hello.
U.S. West:	U.S. West has a collect call from inmate "Leland Clark", at the Utah State Prison. To refuse this call, hang up. If you accept this call, do not use three-way or call waiting features or you will be disconnected except for legal calls. This call may be recorded or monitored except for approved, privileged legal communication. To accept this call, dial 1 now. (1 is dialed.)
	Thank you.
GARDNER:	Hello.
PEPPER:	Hello.

GARDNER: Hey, how are you?

PEPPER: Hey, good.

GARDNER: Good.

PEPPER: I take it, uh, Lee got to you today then, huh?

GARDNER: Yow, yow, he just.....kind of at lunch time. (Laughter)

PEPPER: God! How long before you guys are gonna' come outta' your cell or whatever it is?

GARDNER: Uh, they're talkin' about on Tuesday, I believe the 20th. At least, the sergeant was sayin' last night that we'll start comin' out two cells at a time for two hours every other day.

PEPPER: And how're they doin' it now? Just one at a time?

GARDNER: Yow, we come out one cell at a time for an hour.....

PEPPER: So, just...

GARDNER: ...minutes.

PEPPER: ...one person at a time gets to come out?

GARDNER: Right, and they do it by tiers. The bottom tier comes out one day and then the top tier comes out the next day. So, we come out just one cell, first...uh, two people in a cell.

PEPPER: Oh shit!

GARDNER: Yow.

PEPPER: So, if...I would go absolutely nuts!

GARDNER: Yeah, I'm goin' nuts and I got a pretty good cell. You know? I...but it still drives me...(Laughter)

PEPPER: Oh God!

GARDNER: Oh...

PEPPER: ...cells be pretty bad if you live with someone that you don't like. (Laughter)

GARDNER: Yeah. Uh, yeah, pretty obnoxious. Lee was tellin' me that, uh, he used a different name.

PEPPER: Huh?

GARDNER: Lee was tellin' me that when you got your phone call? that he said another name besides his or somethin'.

PEPPER: I did...uh, you're losin' me.

GARDNER: Uh, when Don called? Lee said that he said another name or somethin'?

PEPPER: When Don called...

GARDNER: Yeah.

PEPPER: When he called me he tried getting' hold of me Wednesday night.

GARDNER: Right. And he said that Don used a different name or somethin', when he called?

PEPPER: No, no, but, I haven't talked to anybody.

GARDNER: OK.

PEPPER: I got a call...

GARDNER: Uh huh.

PEPPER: ...and on my Caller ID I think it, I didn't, I don't have the number with me but, uh, the number, I thought, was on my Caller ID was Don.

GARDNER: Uh huh.

PEPPER: But I wasn't sure.

GARDNER: Right.

PEPPER: So, I wasn't about to just, you know, dial up that number and call it back.

GARDNER: Right.

PEPPER: Have you been able to get ahold of him?

GARDNER: I haven't yet. Um...

PEPPER: OK.

GARDNER: (Inaudible)

PEPPER: I just, you know, I kinda' hate, you know, doin' it cold...I wanna' make sure he knows what's goin' on.

GARDNER: Right.

PEPPER: So he doesn't like, you know, fly a kite.

GARDNER: Right. Well, he should have the letter now...

PEPPER: (Inaudible)

GARDNER: So, I can't remember, I sent it, I put it in the mail Monday, so he should have it by Wednesday at the latest, easily, it's a day from here.

PEPPER: Um kay...

GARDNER: And uh...

PEPPER: ...I got talkin' a little bit...you know, on that takin' one "Z" in?

GARDNER: Uh...

PEPPER: Takin' a whole "Z" in?

GARDNER: Uh huh.

PEPPER: Is, is, that's gonna' be kind of hard for you guys to move around over there, isn't it?

GARDNER: Uh, yow, I think so. And Lee was tellin' me somethin' about...

PEPPER: ~~Should I put it down to a quarter?~~

GARDNER: ~~Um, yeah, a quarter or a half would probably go. I know Lee was sayin'~~ somethin' about I guess you know somebody over in one of these, uh, other sections or somethin'?

PEPPER: Uh huh.

GARDNER: From before or somethin'? So...

PEPPER: ~~Um-kay. What about the, uh, black? You gonna' be able to move it?~~

GARDNER: Um, well, he just got a couple "kites" back saying, "Yeah, I'm waitin' on a 'kite' back, I just sent it." I sent one the other day, I don't think it made it. Uh, I don't write a whole lot in my "kites". (Laughter)

PEPPER: Yeah, I don't blame ya'.

GARDNER: No I'm, I'm really, even the letter that went out to my buddy, that's real, kinda', I told him, "Here, look. Call this number...fill you in all the way." Uh, I don't wanna' write a whole lot in the letter.

PEPPER: OK.

GARDNER: So...

PEPPER: And he puts, and he knows that he, he's OK with it?

GARDNER: Right.

PEPPER: I.....said, you know, a little weird, you know? First times, you know what I mean?

GARDNER: Yeah.

PEPPER: Well, especially with him workin' around and so forth.

GARDNER: Right. And...oh shoot! Can you hang on for just a second? They're gonna' rack us in real quick and pull somebody out.

PEPPER: OK.

GARDNER: Is that OK?

PEPPER: If you want, do you wanna' just call me back?

GARDNER: Well, I should be right back out. It'll be like, a minute and a half.

PEPPER:_ _ _ Oh, OK.

GARDNER: All right. I'll be right back in just a sec.

PEPPER: OK.

Off Tape (Short period of time.)
Back on Tape

(Whistling)

Back off Tape (Very short period of time.)

Back on Tape

(Background noises.)

Back off Tape (Several seconds.)

Back on Tape

GARDNER: Hello.

PEPPER: ...you're back.

GARDNER: Yeah, sorry about that. (Laughter)

PEPPER: No problem.

GARDNER: ...I don't know if you heard me in the background, I'm all yelling, "...hurry up I'm on the phone."

PEPPER: Yeah. (Laughter) Like those guys really give a shit.

GARDNER: Yeah, well, the dude next to me, in the cell next to me, wants to talk to his "cellie". You know what I mean?

PEPPER: Oh shit. Uh, well, you tell me, should I call 'im?

GARDNER: Yow, I would give him a call. Uh...

PEPPER: OK.

GARDNER: Like I said, they should have a machine. He might even, I know they have a cell phone, I don't know their cell phone number though, but...

PEPPER: Well, I'll just call the numbers you gave me.

GARDNER: So, he might even have it forwarded to his cell phone. (Laughter)

PEPPER: Yeah. Yeah (Inaudible).

GARDNER: Yow.

PEPPER: Is that, did Lee tell ya' I was takin' off?

GARDNER: Uh, yeah, that you were goin' to New York for the weekend.

PEPPER: Yeah, well, not just the weekend, I'm, I might leave this weekend or I might leave the first of next week, I'm not sure.

GARDNER: Uh huh.

PEPPER: So, I'm just gonna' get this set up and then I'll just have Jackie take care of it for me while I'm gone.

GARDNER: OK.

PEPPER: But, uh, hell. Everything outta' go great. Who knows?

GARDNER: And also, uh, you might wanna'...let him know, I know I put it in the letter, but it's been probably a couple of days since he read it, and like I said, he works two jobs. You might wanna' double let him know that he'll, he only has to deal with you and me directly.

PEPPER: Yeah. And no one else. I don't wanna'...

GARDNER: Yeah.

PEPPER: ...well, other than Jackie, my "old lady".

GARDNER: Right.

PEPPER: But, nobody else. I...the more people that put their fingers in it, the more...the less money I make.

GARDNER: .....and I mean, for some reason, like if I, 'cause I signed my...if I go to Gunnison instead of here, and I'll tell him to deal with Lee.

PEPPER: OK.

GARDNER: And, uh, that way, you guys can keep things goin'.

PEPPER: Well, if, you know...Isn't Lee tryin' tuh do a compact or somethin'?

GARDNER: Yeah, yeah. He's tryin' to get a compact.

PEPPER: And, I'm not sure, I don't understand what he's sayin' when he says that, but...

GARDNER: He's, I think he's tryin' to get in Washington State to do his time up in the joint up there.

PEPPER: I'll never understand this shit! (Laughter)

GARDNER: I know.

PEPPER: OK. Well, I'll give him a buzz then and...

GARDNER: OK.

PEPPER: ...see what we can work out.

GARDNER: OK. OK. And if you can't get hold of him today, try about, uh, shoot, six, six-thirty? I know sometimes when I talk to his wife, he usually calls about six-ten or so.

PEPPER: OK.

GARDNER: And it's usually to let her know, uh, he's on his way home.

PEPPER: OK.

GARDNER: So, that might be one of the best times to catch him.

PEPPER: Hell! I'll give it a shot and then, yeah, I'll just get him, like I said, you know, only with...with that much...

GARDNER: Uh huh.

PEPPER: ...you know, at first I was just thinkin' "Money, money, money!" ...

GARDNER: Right.

PEPPER: So, I think I am, you know, I'd rather be safe.

GARDNER: Right.

PEPPER: 'Cause I don't want, uh, Lee or yourself or anyone to get, uh, get your ass in a jam in there.

GARDNER: Right. And that's always the best way to go – safest way...

PEPPER: Yow.

GARDNER: ...best way. (Laughter)

PEPPER: So, whadda' you think on the black though? Shall I send one in or not?

GARDNER: Yeah. If you wanna', go ahead and, uh, I should, like I said, I should hear back, and Lee's heard back, and I know a couple of other people I can talk to that are floatin' around here. I just haven't talked to 'em about it yet.

PEPPER: OK. ...uh, one thing, do you care what kind?

GARDNER: No, it doesn't matter.

PEPPER: OK.

GARDNER: And, uh, we'll go ahead and get things rollin'.

PEPPER: Good. We'll do it then.

GARDNER: All right.

PEPPER: Hey! We'll talk at you later.

GARDNER: All right. Take care.

PEPPER: OK. Bye, bye.

GARDNER: Bye, Bye.

END SIDE 1 OF TAPE